IN THE SUPREME COURT OF THE UNITED STATES

Spring Term, 1976

No. ~~76-5~~168

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

EDWARD COLLINS DAVIS,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

MOTION TO PROCEED INFORMA PAUPERIS

Your petitioner moves the court that he be allowed to file this petition pursuant to Rule 53 of the Rules of this Court. His affidavit of indigency is attached hereto at page 27.

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AFFIDAVIT

I, Edward Collins Davis, the petitioner herein, hereby apply for leave to proceed in the present cause without prepayment of fees or costs or security therefor. In support of my application, I declare under penalty of perjury that the following facts are true:

1. I am the petitioner in the present cause and I believe I am entitled to redress.

2. I do not possess or own any money, stocks, bonds, real estate or other property, either real or personal.

3. Because of my poverty, I am unable to pay the costs of the present action or give security therefor.

4. The nature of the action is a petition for writ of certiorari.

Date: August 3, 1976 Edward Collins Davis
Affiant

Sworn and subscribed to
before me this 3rd day
of August, 1976.

C. E. Satterwhite
Notary Public

C. E. SATTERWHITE NOTARY PUBLIC WAKE COUNTY, N.C.

My commission expires:

8-5-80

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PETITION FOR WRIT OF CERTIORARI

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The petitioner, Edward Collins Davis, prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina, entered April 6, 1976, by filing the conviction of the petitioner by the Superior Court of Buncumbe County, entered March 28, 1975.

OPINION BELOW

The opinion of the Supreme Court of North Carolina, State v. Davis, 289 N.C., 223 S.E. 2d 296 (1976) is appended to this petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

I. Was the imposition of the Death Penalty under North Carolina's statutory scheme, upon petitioner, violative of the Eighth and Fourteenth Amendments?

II. Did permitting the state to introduce the petitioner's patenty absurd statement and denial made within a half hour after he had been arrested on charges of public intoxication while denying him the opportunity to prove through a state's witness a second statement made approximately twenty-five hours later deny your petitioner due process as guaranteed him by the Fourteenth and Fifth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

AND

N.C.G.S. 14-17

Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson,

rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.

STATEMENT OF CASE

The petitioner, Edward Collins Davis, was charged with the first degree murder of each of two North Carolina highway patrolmen. The two cases were consolidated for trial which began March 17, 1975, in Superior Court for Buncombe County and concluded almost two weeks later on or about March 28, 1975. Upon the evidence presented, the jury found the petitioner guilty of murder in the first degree on each count, and pursuant to N.C.G.S. 14-17, a mandatory death sentence was imposed by the Court. The facts of the case pertinent to this petition are as follows:

At trial, petitioner was represented by privately retained, out-of-state counsel. His appeal to the North Carolina Supreme Court was prosecuted as an indigent by court assigned counsel.

The evidence presented at trial showed that the defendant was arrested for driving while intoxicated on October 5, 1974. The arresting officer was Trooper Canipe, one of the two deceased highway patrolmen. Petitioner was handcuffed and taken by Trooper Canipe to the Courthouse in Asheville, North Carolina for a breathalyzer test. Sergeant Arledge, the other deceased highway patrolman, was the breathalyzer operator on duty in Asheville.

The petitioner was seen by a witness entering the Buncombe County Courthouse at approximately 7:50 p.m. with his hands cuffed behind him in the company of Trooper Canipe on the same day. At approximately 8:23 p.m. that evening, another officer found Sergeant Arledge and Trooper Canipe dead in the breathalyzer room. Expert testimony was later presented which established that Trooper Canipe and Sergeant Arledge had died of gunshot wounds and that it is highly probable that the bullets were fired from Trooper Canipe's service revolver. The petitioner was not present in the

breathalyzer room when the bodies were discovered.

At approximately 7:15 a.m. the next morning the petitioner was arrested by the Buncombe County Deputy Sheriff within five hundred feet of the actual police station on a charge of public intoxication. At 7:42 a.m. that same morning, the petitioner made a statement to James T. Maxey, an agent of the North State State Bureau of Investigation. That statement was admitted in evidence at trial, and in it petitioner said that on the day before he had been in the breathalyzer room with Officers Canipe and Arledge and that as he was talking to one of the officers a man with gray hair entered the room and shot both highway patrolmen and then ran. The petitioner told Agent Maxey and the other officers present at his interrogation that he picked up his "damn stuff" and ran. He spent the night hiding in the weeds and the briars and was walking to the courthouse to tell the police that he was innocent when he was arrested the next morning. This statement, made October 6, 1974, was introduced by the state into evidence.

After making the statement, the defendant was retained in custody.

The following morning, on October 7, 1974, the petitioner made another statement to Sergeant R. H. Cook who had been present during the making of the first statement. Evidence of this second statement, of October 7, 1974, was elicited during the trial in a voir dire examination of Sergeant Cook

In his October 7 statement, the petitioner stated that he wanted to get things straight and did not wish to embarrass his son who was a policeman in Florida. He stated that Officer Canipe had brought him to the breathalyzer room and Sergeant Arledge was seated in the room when they arrived. Sergeant Arledge made a telephone call and at the conclusion of the call told the petitioner "Mr. Davis, you are not

even supposed to be driving in the state of North Carolina. Your license have (sic) been permanently revoked." Trooper Canipe was filling out a form and handed it to the petitioner with instructions that he sign it. The petitioner told Trooper Canipe to sign it himself and thereupon Canipe pulled his gun and shoved the petitioner in the corner and told him to sign the paper or he would blow his heart out. A scuffle ensued and the gun fired twice. Petitioner then told Sergeant Cook that he realized at that time that he was responsible for the officers' death and that he grabbed various items in the room which he thought might identify him and ran.

Sergeant Cook, who had been present during both the statement of October 6 and October 7, was tendered for purposes of cross-examination by the state. No direct evidence was elicited from him. Defense counsel's attempt to elicit the second statement from Sergeant Cook was objected to by the prosecuting attorney, and the objection was sustained. Agent Maxey, from whom the state elicited the first statement, said that he was not present during the time that the second statement was taken.

The state presented other circumstantial evidence which linked the petitioner to the homicide, including various items found in the petitioner's pockets at the time of his arrest and items belonging to the deceased officers.

The defendant offered no evidence.

After instructions from the Court, the jury retired. During the course of their deliberations, the jury returned to the courtroom three times; once to collect certain exhibits, and twice for additional instructions; first on second-degree murder and then on first-degree murder.

A verdict of guilty on both counts was returned and two mandatory death sentences were imposed by judgment.

Thereafter, the petitioner appealed his conviction to the North Carolina Supreme Court. On April 6, 1976, that Court affirmed the conviction.

REASONS FOR GRANTING WRIT

In its present posture, this case presents two issues which require the attention of this Court. The first is clear. The petitioner was sentenced to death under the same statute held by this court to be unconstitutional. Woodson v. North Carolina, _____ U.S. ____ (75-5491, July 2, 1976), 44 L.W. 5267. Ordinarily a remand by this Court to the Supreme Court of North Carolina for proceedings not inconsistent with the court's decision in Woodson would be appropriate. However, the second issue presents important questions of basic fairness and due process in the conduct of state criminal trials which, as decided by the Supreme Court of North Carolina, appear to conflict partially with decisions of this Court, with Circuit Court decisions, and with the Fourteenth Amendment.

I. The Imposition of the Death Penalty under North Carolina's Statutory Scheme, Upon Petitioner, is Violative of the Eighth and Fourteenth Amendments.

The petitioner was sentenced to two death sentences pursuant to N.C.G.S. 14-17, the same statute found by this Court to be constitutionally deficit in Woodson v. State of North Carolina, _____ U.S. _____ (75-5491, July 2, 1976), 44 L.W. 5267. For that reason, imposition of the death penalty on your petitioner is unconstitutional.

The validity of the imposition of the death penalty in face of the Eighth and Fourteenth Amendments to the United States Constitution was preserved and passed on by the Supreme Court of North Carolina in your petitioner's appeal.

II. Permitting the State to Introduce the Petitioner's Patently Absurd Statement and Denial Made Within a Half Hour After He Had Been Arrested on Charges of Public Intoxication While Denying Him the Opportunity to Prove Through a State's

Witness a Second Statement Made Approximately Twenty-Five Hours Later Denied Your Petitioner Due Process As Guaranteed Him by the Fourteenth and the Fifth Amendments to the United States Constitution.

As was previously set forth in Statement of the Case hereinabove, approximately twelve hours after the deaths of the two highway patrolmen in this case, the petitioner was arrested on a charge of public intoxication. Within twenty-seven minutes of that arrest, he made a ridiculous statement concerning the homicides to investigating officers. He told the officers that when he was in the breathalyzer room, a man with gray hair entered and shot the two officers and then fled.

That statement was introduced by the State into evidence and its implausibility was thoroughly exploited by both prosecuting attorneys in their closing arguments to the jury.

The trial judge who admitted the statement into evidence found that it was made voluntarily and that while the defendant had the odor of alcohol on his breath he was not intoxicated when he made it. There is evidence in the record to support his findings and the voluntariness of this first statement was not challenged on appeal.

What was challenged on appeal was the failure of the trial court to admit the defendant's second statement, given approximately twenty-five hours later while he was still in custody. In that statement, the defendant presented a much more believable version of the facts, consistent with other evidence in the case.

On October 7, 1974, the defendant stated that in the breathalyzer room he made an insolent remark to Trooper Canipe, which was entirely consistent with his previous insolent remark at the time of his arrest ("I have a son who is a police officer, but he's not a son of a bitch like you"). In response to the remark in the

breathalyzer room, Canipe drew his gun and a struggle between the petitioner and him ensued. During that struggle, apparently both officers were killed.

At trial, the prosecution called Sergeant R. H. Cook who had been present at the time both statements were given to the stand. A voir dire examination in the absence of the jury was held, and Sergeant Cook gave testimony of both statements. Following the examination, the trial judge held both statements to be admissible in evidence. Thereupon, the jury was recalled. The state elected not to examine Sergeant Cook in the presence of the jury, but tendered him for purposes of cross-examination. On cross-examination, the petitioner's counsel attempted to elicit evidence of the second statement from Sergeant Cook. The trial court held that testimony inadmissible.

The last witness called by the state, was James T. Maxey, an agent of the North Carolina State Bureau of Investigation. He has been present during the time that the petitioner made his first statement but had not been present during the time that petitioner made his second statement. Agent Maxey was permitted to testify to the jury concerning the defendant's first statement.

On appeal to the Supreme Court of North Carolina, the petitioner submitted as error the failure of the trial judge to permit introduction of evidence concerning his second statement. The North Carolina Supreme Court affirmed the trial judge's ruling, holding the second statement to fall within that category of hearsay evidence known as "a self-serving declaration".

The truth is, of course, that both statements were "self-serving". The state was permitted to introduce the first, implausible statement as a false statement. See generally, Stansbury, North Carolina Evidence, Brandis Revision, § 178 and McCormick, Evidence, 1954 ed. §250. However, the proffered ground for excluding the second statement as "self-serving" is invalid,

especially under the facts of this case.

The rule against the admission of self serving declarations is an aberration and an unfortunate holdover from ancient common law evidentiary practices. As Professor McCormick has noted:

> " The doctrine that a party's out-of-court declarations or statements cannot be evidence in his favor, because 'self serving' seems to have originated as a counterpart and accompaniment of the rule, now universally discarded, forbidding parties to testify. When this latter rule of disqualification for interest was abrogated by statute, the accompanying rule against 'self serving' declarations should have been regarded as abolished by implication. Unfortunately it has lingered in the language of many opinions as a sweeping rule of exclusion.
>
> . . . Other courts, however, have applied here a supposed general rule of exclusion of self serving statements. This has been especially marked in an area where exclusion creates the greatest danger of injustice, namely in exclusion of the declaration of the accused, and homicide and assault cases, made before or after the event, of his peaceful intentions, or of his fear of the other party. . . . The courts which exclude assume that because made by a party and offered on his behalf the declarations are so likely to be dishonest as not to be worth hearing. This is the same discredited assumption that interested testimony is to be purged not weighed, which rested the ancient rule that parties could not testify." McCormick, Evidence, 1954 edition, Tp. 588-589.

The facts of the present case fall most squarely within Professor McCormick's criticisms of the exclusionary rule in question. Here, the petitioner made his first statement twelve hours after being arrested for driving while intoxicated and twenty-seven minutes after being seen staggering on a public street and having been arrested for public intoxication. The second statement, made a day later while still in custody, showed that he reacted in fear and self-defense to Officer Canipe's attack, and most importantly contains an admission that the petitioner knew that he was responsible for the deaths of the two officers. Unlike the first statement, the second statement does not seek to deny all guilt of the petitioner.

Undersigned counsel has been unable to discover a case from this court squarely on point. However, in a similar situation, the Seventh Circuit has spoken directly to the self serving declaration rule and held its absolute application invalid:

> "We think that a flat rule of exclusion of declarations of a party on the grounds that they may be described as 'self serving' even though otherwise free from objection under the hearsay rule and its exceptions, distracts from the fund of relevant information which should be available to the jury without, and compensation materially insuring the integrity of the trial process." United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), at 381 [Citations omitted].

Moreover, this court has showed no reluctance to set aside traditional state rules of evidence when those rules interfere with fundamental fairness and due process at trial. In Chambers v. Mississippi, 410 U.S. 284 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973), the court stated in conclusion:

> "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.
>
> We conclude that the exclusion of this critical evidence, coupled with the state's refusal to permit Chambers to cross-examine MacDonald denied him a trial in accord with traditional fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." 410 U.S. at 302-303.

The flaw in the present case was in allowing the prosecution to present the jury with an incomplete picture of the defendant's statement, a statement given only minutes after he had been arrested for public intoxication, while denying the defense an opportunity to show another statement made twenty-five hours later, after a period of incarceration and when the defendant had presumably been completely sober. Admittedly, undersigned counsel has been unable

to discover any case similar to the present which has been held to violate the "rule of completeness". Those cases are generally collected in the annotation contained at 118 ALR 146. However, the present facts do present a peculiar situation in which prosecution was permitted to make a showing that was in fact misleading. As this court noted in United States v. Nixon, 418 U.S. 683, 709, 41 L.Ed. 2d 1039, 94 S.Ct. 3090 (1974):

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." [Emphasis supplied].

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted to review the decision of the Supreme Court of North Carolina.

This the 3rd day of August, 1976.

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